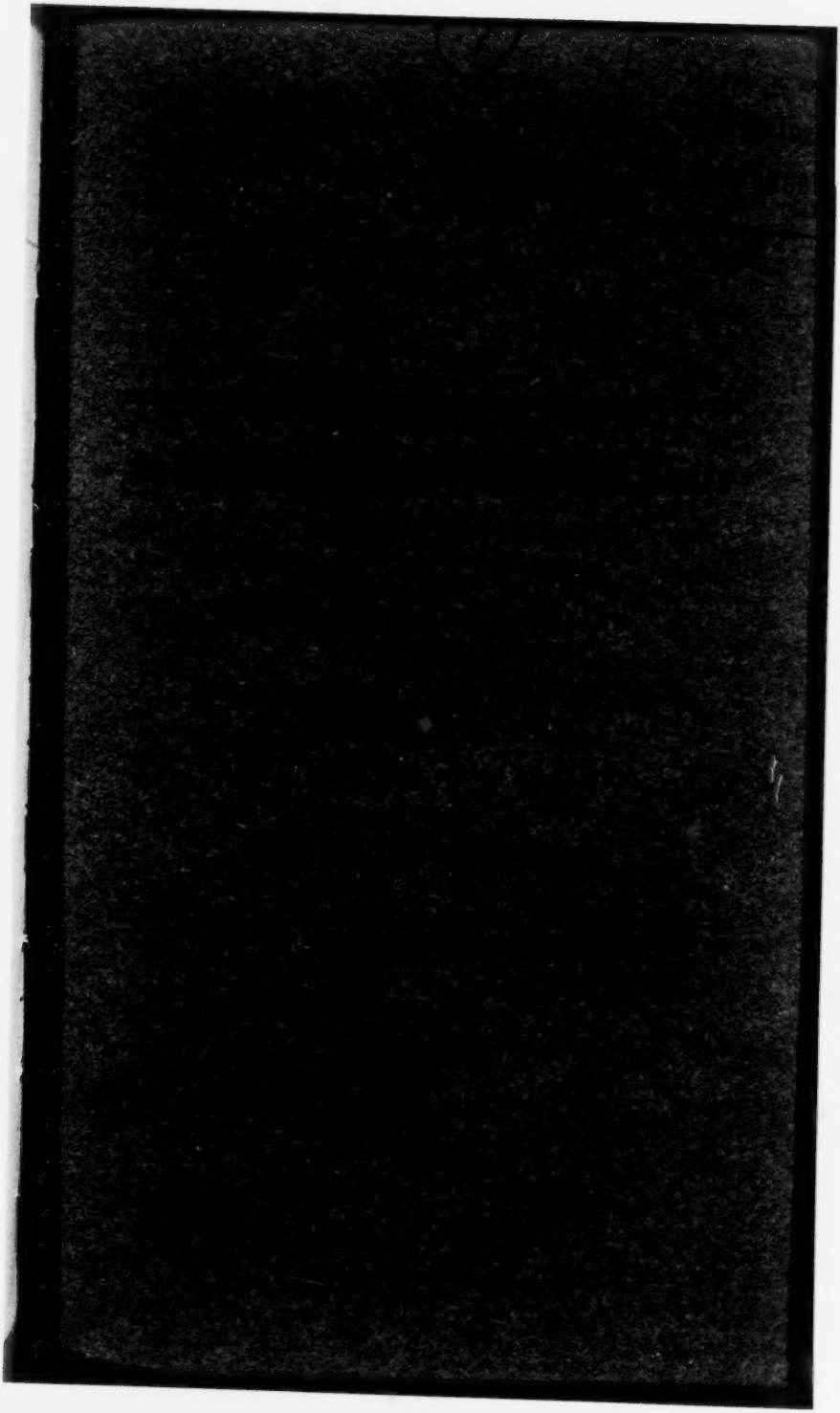

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 282

THE UNITED STATES, APPELLANT
v.
WYCKOFF PIPE & CREOSOTING CO., INC.

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims wrote no opinion in this case, and the case is listed in 59 Ct. Cls. 980 as one of the judgments rendered by the court without opinion.

JURISDICTION

The judgment to be reviewed was entered on June 2, 1924. (R. 37.) A motion for new trial was then seasonably made and overruled by the court below on October 20, 1924 (R. 38), and a petition for an appeal was duly filed on December

16, 1924, and allowed on January 12, 1925 (R. 38), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 941).

THE QUESTION

The United States made a contract with appellee for the laying of a creosoted wood-block floor in certain navy yard buildings. The work was delayed through the failure of the United States to perform its undertakings, and recovery was had against the United States for the breach.

The sole question presented relates to the measure of damages.

The Court of Claims allowed recovery for the reasonable value of the work when it was performed less what had already been paid. The United States contends the recovery should have been limited to the loss and damage suffered as a result of the delay.

STATEMENT OF FACTS

The amount involved in this case is small and possibly it does not deserve the attention of this Court. The appeal, however, was taken more than a year ago; interest on the judgment would have to be paid if it is dismissed; a palpable error was committed by the trial court, which may be repeated in other cases if not corrected, so we have concluded to submit the case.

The appellee is a Connecticut corporation, and on December 10, 1917, entered into a contract in writing with the Government whereby appellee agreed to furnish all labor and material necessary to lay wood-block floors in the structural shop, the machine shop, and the foundry at the navy yard in Norfolk, Virginia. (R. 31.)

The contract provided that the wooden-block flooring should be laid in a concrete base which was to be prepared by the Government (R. 31), and the court found as a fact that at the time the contract was executed no delay was anticipated by the parties (R. 32). The court below found that the Government did not furnish the concrete base and prevented appellee from beginning work in the structural shop until January 1, 1919, in the foundry until August, 1919, and in the machine shop until January and April, 1920; that all such delays were without fault of appellee (R. 32); that the cost of labor had materially increased, and appellee had paid renewal premiums upon bonds, insurance upon material purchased, storage costs upon such material, increased freight rates, and suffered loss by shrinkage of the lumber, none of which loss had been paid to appellee, except fifty per cent of the increased labor cost (R. 32).

In November, 1918, the Government desired to increase the amount of flooring, and requested appellee to advise whether it was willing to perform this additional work at the contract price. Ap-

pellee replied that the costs had advanced (R. 32, 33)—

> to such an extent during the past year that we shall be very fortunate indeed if we break even on this contract and the indications are that we shall perform the contract at a loss, this after taking into consideration the fact that we are partially protected on the cost of the lumber which we purchased to a large extent before the advance and we understand that we are also 50 protected on the cost of labor, as it is our understanding that we shall be allowed to make claim against the Navy Department for one-half of the advance in the cost of labor since the date of the contract, * * *

The letter of appellee then stated that (R. 33)—

> With regard to an extension of 2,500 sq. yds. or thereabouts, we should accordingly request a readjustment of the contract price to cover the advance in the costs of materials during the past year and the advance in the cost of labor.

The letter also stated that (R. 33)—

> We (appellee) have seriously considered the possibility of making claim against the Navy Department for the loss which we are liable to meet with on the original contract as the time of completion of this work has been greatly delayed through reasons no fault of ours and the prices which showed us a reasonable profit, if the contract could have been performed on the date antici-

> pated, are now the opposite of attractive. If we have any precedent for making claim for loss due to postponement other than a claim for one-half of the advance in the labor costs, we should be glad to have you advise us, in which case we might possibly do the entire work and make claim for the excess costs entering into the completion of both the old contract and the extension of the contract.

The Government replied, requesting appellee to "submit its revised figures for this additional work" (R. 33), and stated that with reference to appellee's request for additional compensation on the original contract there was no precedent for making claim, and that therefore the claim should be taken up directly with the Bureau of Yards and Docks. (R. 33.) In December, 1918, appellee offered to do the additional work at $2.68 per square yard, and stated that (R. 34)—

> This quotation covers what we have previously offered and are under contract to furnish at the rate of $2.26 per square yard in accordance with our proposal of November 12, 1917.

This meant, of course, that under the contract for additional work quoted at $2.68 per square yard the same items of labor and material would be furnished per yard as were to be furnished under the original contract at $2.26 per yard. Appellee stated the basis of the calculation of this price, and on December 19, 1918, was informed

that its submitted price of $2.68 appeared to the Public Works Officer to be reasonable, and this price was thereafter approved by a board " whose duty it was to report the cost of additional work," and the time of appellee was extended because of the additional work, and on December 23, 1918, appellee " formally accepted this addition to the contract at the price stated." (R. 34.) Appellee was notified to proceed with the work in the structural shop on January 1, 1919, and on January 30, 1919, appellee reported progress to that date and informed the officer in charge that (R. 34)—

> it would have a claim for extras by reason of the long unanticipated delay and requesting to be informed whether or not because of the uncertainty of the amount of additional expense to which it had been subjected it might defer presenting its claim until the completion of the contract " without prejudice to us in view of section 18 of the general provisions."

On February 25, 1919, appellee stated to the Public Works Officer the items of its proposed claim as follows (R. 34, 35)—

> 1. Extra labor for manufacturing and laying the paving blocks on account of the advance in the scale of wages, between November 3rd, 1917, and the date when the labor was performed.
>
> 2. Extra expense occasioned by the long and unanticipated and unwarranted delay in ordering the work to proceed since the

date of the contract, which was December 10th, 1917, including—

(*a*) Renewal premiums on the surety company contract bond.

(*b*) Additional freight rates on sand and other materials.

(*c*) Additional cost of sand due to the fact that the Government commandeered the sand during the interval between the date of and performance of our contract and the party with whom we contracted for sand furnished same through Government channels at increased cost.

(*d*) Additional quantities of expansion joints required, owing to the changes in the structural shop plans.

(*e*) Additional cost of creosote oil.

(*f*) Storage, insurance, and carrying charges on a large stock of lumber purchased for the account of your contract and carried on our yard for a space of between one and two years.

Without passing on these claims, will you kindly acknowledge receipt of this letter and advise that we will not be prevented from urging them by reason of section 18 of the general provisions placing a limit of 60 days on the making of such claims.

The Public Works Officer acknowledged the receipt of this communication and stated that (R. 35)—

the justice of the main contention in these claims is recognized, and on account of the fact that the delay, caused in your contract

> by the installation of the floor, performed by the Government, making the amount of claim uncertain at the present time, it will be satisfactory for you to make this claim for a definite amount in detail upon the completion of your work.

The original work and the additional work in the structural shop was all done about the same time, and for the additional work appellee was paid $2.68 per square yard. (R. 35.)

In January, 1919, the Government notified appellee to do additional work in the foundry, and the price of $2.68 per square yard was regarded as applicable to such additional work. Appellee, however, was not permitted to proceed with the original or the additional work in the foundry until August, 1919, and in the meantime the costs had increased. (R. 35.) In February, 1920, appellee was requested to lay the additional flooring of the machine shop, and it submitted a price of $3.28 per square yard, which price was approved by the committee in charge, and the original contract work and the additional work in the machine shop was done in January and April, 1920, and appellee was paid $3.28 per square yard for the additional work. (R. 35.)

> *The record does not disclose by items the amount of extra expense incurred by the plaintiff by reason of the lengthy delay in the performance of the work.* (R. 35.) (Italics ours.)

The Court of Claims then found that lumber, which was purchased for the performance of the contract, increased in value while on hand during the time of delay in the sum of $6,021.23. The findings also show that the market price of the creosote oil purchased for the original contract work and the additional work in the foundry had increased after it was purchased to the extent of $712.59. (R. 36.) It then found that the *reasonable value* (not cost) of this flooring at the time it was actually laid was $9,936.54 in excess of the amount paid to appellee. (R. 36.)

The findings then proceed to discuss another item growing out of another contract for which the court rendered judgment of $186.45, which we do not question in this Court.

The court rendered judgment for said sum of $9,936.54, being the difference between the reasonable value of the work and the amount appellee was paid, together with the sum of $186.45 above mentioned, or a total of $10,122.99. (R. 37.)

The United States made in this Court a motion to remand for additional findings. This motion is not now pressed, as the error complained of seems clear from the findings as they stand.

SPECIFICATION OF ERRORS TO BE URGED

The court erred in awarding the reasonable value of the work at the time it was done less the amount which had been paid, thus disregarding the contracts and contract prices and allowing the con-

tractor the benefit of increase in value of materials previously purchased for this work, instead of the carrying charges, and erred in not limiting the recovery of damages to the loss and expense suffered by the contractor as a result of the delay.

SUMMARY OF ARGUMENT

The proper measure of damages for the delay caused by the United States was the additional cost to the contractor resulting from the delay.

The trial court erred in allowing the contractor to recover the reasonable value of the work at the time it was performed, less what had been paid. This disregarded entirely the contracts and the contract prices and allowed recovery on a *quantum meruit*. It also had the effect of allowing to the contractor the increase in value of materials purchased and kept on hand for the performance of the contract. For damage on account of such materials there should have been allowed only the insurance, storage, and carrying charges during the period of delay. There are no findings by which recovery under the correct rule of law may be computed.

ARGUMENT

THE COURT OF CLAIMS ADOPTED A WRONG MEASURE OF DAMAGES

The lower court found that "the reasonable value of the flooring provided for in the original contract, at the times it was permitted to be laid, * * * was $9,936.54 in excess of the amount

plaintiff was paid therefor." (Finding XI, R. 36.) Recovery was allowed for that amount (plus an item of $186.45 not here in dispute). (Conclusion of Law, R. 37.)

It is clear, therefore, that the court allowed recovery of the reasonable value of the work at the time it was done less the amount paid. This would not necessarily have produced an erroneous result if the contractor had purchased his material at the prices prevailing when the work was performed, and if the profit included in the " reasonable value " was the same as had been figured in the contract prices, as substantially the same result might thus have been obtained as if the correct measure of damage had been applied. The findings affirmatively show, however, that in anticipation of the performance of the work the contractor had purchased the lumber for the flooring and the creosote oil and kept them on hand until the work was performed, and that the increase in value of the lumber and oil *between the time they were purchased and the time they were used in the work* was $6,733.82. (R. 36.) It is clear that the court gave the contractor in the allowance of damages for delay $6,733.82, which represented the increase in value, after purchase, of materials on hand for the work. This was obviously an error. The correct measure of damage for the delay was the loss actually sustained by the contractor as the result of delay. *United States* v. *Smith,* 94 U. S. 214; *United States* v. *Mueller,* 113 U. S. 153;

United States v. *Barlow*, 184 U. S. 123; *Ripley* v *United States*, 223 U. S. 695.

While in the cases cited the Government did not delay the contractor in the *commencement* of the work, the Government did cause the *suspension* of and *interference* with such work after it was started. These defaults of the Government, i. e., delaying and suspending or interfering with the contractors' undertakings, are so similar as to require the application of the same measure of damages. The *Smith case* involved the liability of the United States by reason of its improper suspension of the work of the contractor who had agreed to supply the skilled labor and the materials necessary for the erection of certain buildings for its use. With respect to the question of damages the Court said (pp. 218-219):

> The United States can be required to make compensation to a contractor for damages which he has actually sustained by their default in the performance of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States.

If the contractor was diligent enough to purchase his materials early, his loss on account thereof, resulting from the delay, was merely the cost of carrying the material. Indeed, that is the basis on which the claim was originally made and damages

claimed, because in it appears the item " storage, insurance, and carrying charges on a large stock of lumber purchased for the account of your contract and carried on our yard for a space of between one and two years." (R. 34.)

The allowance by the court of $9,936.54 as the difference between the amount which had been paid and the reasonable *value* (not cost) of the work when done, gave the contractor the benefit of the rise in value, after purchase, of the material purchased for the contract, amounting to $6,733.82. It was the extra cost resulting from the delay, not the value of the work, which should have been considered, and the item of $6,733.82 should have been left out, and in its place the contractor should have been allowed the insurance, storage, and carrying charges of the material purchased and held for the work. It has been shown that the court's error went beyond a mere mistake in respect to damages, and amounted to a complete disregard of the contract prices agreed on, and allowed recovery on *quantum meruit* for the work.

The findings, therefore, do not sustain the judgment. There are no findings which enable the ascertainment of damages by any proper rule. The Court of Claims found that the record before it did not show what the extra expense was. (Finding IX, R. 35.)

The appellee seeks to avoid this situation by the contention (urged for the first time in opposition

to the Government's motion for a new trial) that it made a new contract with the United States for the work covered by the original contract. The findings conclusively show that three new contracts were made for *additional* work at a higher price, but the work originally contracted for, as well as that covered by the supplemental contracts, was performed under the contracts with the understanding a claim would later be made for damages caused by the delay of the United States. The petition filed in the Court of Claims proceeded on the same theory (R. 2, par. 6) and pleaded in substance the doing of the work under the contract subject to the right to recover, in addition to the contract price, the increased cost resulting from the delay.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the Court of Claims must be reversed and that the case should be remanded for further proceedings in that court.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

MARCH, 1926.